II. Report on Bilateral Investment Treaties

RECOMMENDATION

The American Bar Association Section of International Law and Practice recommends the following resolution for adoption by the House of Delegates of the American Bar Association:

> BE IT RESOLVED that the American Bar Association favors the ratification by the United States of the Treaties between the United States of America and the Arab Republic of Egypt, Republic of Panama, Republic of Senegal, Republic of Haiti, Republic of Turkey, Kingdom of Morocco, Republic of Zaire, Republic of Cameroon, People's Republic of Bangladesh, and Republic of Grenada, Concerning the Reciprocal Encouragement and Protection of Investments.

REPORT

The U.S. Government launched the Bilateral Investment Treaty (BIT) program in late 1981. Since that time, the United States has signed ten treaties. The treaties the United States has signed have all been approved by the President: Panama (signed October 27, 1982), Senegal (December 6, 1983), Haiti (December 31, 1983), Turkey (December 3, 1985), Morocco (July 22, 1985) and Zaire (August 3, 1984), Egypt (September 29, 1982, a supplemental protocol was signed March 10, 1986), and Grenada (May 2, 1986). All of these treaties have been sent to the Senate for hearings and ratification.

The U.S. Government negotiates BITs from a prototype treaty that covers four main areas: national or most favored nation treatment for investors; internationally recognized standards for compensation in the event of expropriation; transfers of profits and other funds associated with investments; and procedures for the settlement of disputes. All of the BITs the United States has signed contain these fundamental standards.

The purpose of the BIT program is to encourage foreign investment and establish greater international discipline in the investment area by negotiating investment treaties with interested countries around the world. The treaties are designed to provide certain guarantees and protections for foreign investors thereby offering them a stable and predictable legal framework within which to invest overseas. This is a significant accomplishment and represents several years of effort. Most importantly, the treaties signal a shift in the official U.S. policy of "neutrality"—or benign neglect—to a more assertive role in facilitating and protecting the rights of U.S. foreign investors abroad.

There are a number of other BITs trailing this first group which will likely be the focus of our attention over the next year or so. A treaty has been signed with Antigua and Barbuda. Negotiations are nearly complete with Burundi and the Government of Burundi wants to sign a BIT this summer. The Administration has reached agreement on most BIT provisions with Costa Rica, Sri Lanka, Malaysia and Uruguay, although in each case is currently blocked over disagreement on at least one major issue. Further negotiations are being held with Honduras and Gabon, at the request of both governments. Two negotiating rounds have been held with Honduras and three rounds have been held with Gabon. There are apparently still large areas of disagreement.

The Administration will continue working towards agreement in the key issues that remain in the China BIT. There are also a number of new BIT prospects on the horizon. Yugoslavia, Rwanda, Somalia, Tunisia, St. Lucia, St. Kitts and Nevis, and Jamaica have reviewed the BIT text and indicated interest in negotiations. The Gulf Cooperation Council (consisting of Saudi Arabia, Qatar, United Arab Emirates, Bahrain, Kuwait and Oman) have expressed interest in negotiating investment treaties along the lines of the BIT.

PURPOSES AND PROVISIONS OF THE TREATIES CONCERNING ENCOURAGEMENT AND PROTECTION OF INVESTMENTS*

The treaties provide a framework of rules governing foreign investment which is designed to encourage new foreign investment and to ensure nondiscriminatory treatment of existing investments. All of the treaties submitted to the Senate contain, with minor deviations, the following provisions:

Article I defines key terms, including "company of a party," "investment," and "own or control." This article stipulates that each Party reserves the right to deny to one of its companies or to a company of the other Party the advantages of the treaty, if third country nationals own or control the company. Ownership includes any direct or indirect ownership or control, including that exercised through subsidiaries or affiliates. "Investment" is broadly defined to include every kind of investment, including intellectual and industrial property rights.

The Article II provisions on national treatment require that the more favorable of national or most-favored-nation treatment be accorded the establishment of new investments, existing investments and associated activities. This requirement is qualified in several respects. A party is not required to apply the treaty's provisions to existing investments if such

*For a sample treaty, see 25(1) INT'L LEGAL MAT. 87 (Jan. 1986) (United States-Turkey).

application would be inconsistent with contracts, agreements or authorizations made under legislation existing when the investments were made. In addition, specific sectoral exceptions for each Party are typically listed in an Annex.

Parties must accord most-favored-nation treatment within the excepted sectors, and are obligated to notify the other Party of specific measures which constitute exceptions. After the treaty enters into force, no additional exceptions within the enumerated sectors may be applied to an existing investment of the other Party.

Article II further provides for the entry and sojourn of nationals connected with the investments, permits Parties to engage the managing director of their choice, and permits them to engage other personnel of their choice within the other Party's territory, subject to national employment laws.

The Parties recognize in Article II that performance requirements, as a condition of establishment or of expansion, involving export, purchase or other requirements, shall not be imposed.

The Parties guarantee access to judicial and other adjudicatory bodies. Finally, each Party agrees to make publicly available any laws, regulations or decisions affecting investment.

Article III guarantees "prompt and adequate compensation, freely realizable," "equivalent to the fair market value of the expropriated investment on the date of expropriation," which is to include payment for delay as "may be considered appropriate under international law," and which will be fully transferable at the rate of exchange for current transactions prevailing at the time of expropriation. Further, nationals or companies of a party holding equity rights in an investment of another country shall be fully compensated if that investment is expropriated. Article III guarantees the right to prompt judicial or administrative review in the event of expropriation.

Article III ensures that the most favorable of national or most-favored nation treatment will be accorded when compensating for damages due to war or similar events.

Article IV guarantees the right to freely transfer funds and proceeds, in the currency of investment or any fully convertible currency, at the exchange rate for current transactions prevailing on the transfer date, subject to national reporting requirements, withholding tax requirements and creditors' rights.

In Article V the Parties agree to hold consultations at any time if requested by either Party, to hold biannual consultations in order to review the treaty's operations and to endeavor to provide information concerning investments in their territories if requested.

Under the dispute settlement procedures of Article VI, the Parties have consented to submit legal disputes to the International Center for the Settlement of Investment Disputes, if, after six months, the dispute has not been settled by consultation and negotiation, has not been submitted for resolution through a previously agreed-upon procedure, and has not been brought before the judicial or administrative tribunals of a Party. The Parties further agree that indemnification will not be asserted as a defense or offset.

Under Article VII disputes over the treaty's interpretation will be resolved through diplomatic channels or, if the Parties agree, will be submitted to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. If no such agreement is reached, the dispute will, upon the written request of either party, be submitted to an arbitral tribunal.

Article XIII excludes from the provisions of Article VI and VII disputes arising from U.S. Export Import Bank programs.

Article IX preserves existing rights to more favorable treatment and states that the treaty does not derogate from any other existing agreement between the Parties.

Article X preserves each Party's right to use measures necessary to maintain order, to fulfill international obligations, and to protect its security interests. Article XI includes taxation matters from the treaty's coverage, with limited exceptions.

Under Article XII, the treaty will remain in force for ten years following ratification and will then continue in force unless terminated by a Party with a year's written notice.

CONCLUSION

The certification of bilateral investment treaties is a top priority for the Administration and would respond to the need expressed repeatedly by the private sector for a sounder international legal foundation for U.S. investments in developing countries. Such treaties will place U.S. investors in a position comparable to their European competitors who enjoy the benefits of an extensive network of bilateral investment treaties.

The treaties negotiated with these ten nations closely resemble the U.S. prototype investment treaty. All contain provisions concerning national treatment, expropriation and compensation, transfer rights and dispute settlement which are essential to a satisfactory and effective investment framework. Accordingly, the American Bar Association should adopt the resolution recommended by this report.

Respectfully submitted,

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Chairperson

August 1986